Nos. 81-746 and 81-1172

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CITY OF AKRON

Petitioner,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.

Respondents.

and

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.

Cross-Petitioners

v.

CITY OF AKRON, et al.

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER CITY OF AKRON

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I. THE RULING BELOW CONFLICTS WITH THE DUE PROCESS STANDARD APPLIED BY THIS COURT IN DETERMINING THE CONSTITUTIONALITY OF ABORTION REGULATIONS.

The standard of review applied to legislation regulating the abortion decision, as enunciated by this Court in decisions subsequent to Roe v. Wade, 410 U.S. 113 (1973), is whether the regulation "unduly burdens" a woman's constitutionally protected right to choose whether or not to continue her pregnancy. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Maher v. Roe, 432 U.S. 464 (1977); H.L.v. Matheson, 450 U.S. 398 (1981).

Respondent-Cross-Petitioners assert that only a compelling state interest, and a showing that the regulations are narrowly drawn to serve that interest, is sufficient to justify state regulation of the abortion decision. In light of the decisions of this Court permitting first trimester regulation, it is clear that a less stringent standard of review is applied by this Court in evaluating the constitutionality of regulations which do not "unduly burden" the woman's choice.

The two-tier analysis applied by the Court of Appeals subjects abortion regulations to a more

stringent standard of review than that applied by this Court. The first step applied by the appellate court inquired as to whether the regulation had a "legally significant impact or consequence" on the abortion decision. If a legally significant impact was found, the court went on to require a compelling state interest. If a compelling state interest was found, the court then looked to whether the regulation imposed an undue burden. Such a test has never been applied by this Court. Rather, this Court has consistently applied an "unduly burdensome" standard to define the threshold for strict scrutiny. Further, this Court in Matheson, supra, upheld a regulation which required prior parental notice where a minor seeks an abortion. Such regulation clearly had a legally significant impact, but was not unduly burdensome. As noted in Maher, supra, 432 U.S. at 473, "the right in Roe v. Wade, can be understood only by considering both the woman's interest and the nature of the state's interference with it."

II. THE STATE HAS A LEGITIMATE INTEREST IN PROTECTING THE MINOR'S HEALTH BY REQUIRING PARENTAL OR JUDICIAL CONSENT TO AN IMMATURE, UNEMANCIPATED MINOR'S ABORTION.

The Court of Appeals for the Sixth Circuit held Section 1870.05(B) unconstitutional as it is "inappro-

priate, on the basis of deference to parental rights, to provide a possible third-party veto over the decision of the pregnant woman and her doctor to terminate the patient's pregnancy." The Akron ordinance does not impose a third-party veto over the abortion decision; rather, the ordinance provides a constitutionally required alternative procedure for a minor to obtain authorization for an abortion.

Certiorari was granted by this Court on the question of "whether a child under the age of fifteen years can be required to obtain the consent of one parent or her legal guardian or a court order authorizing the minor to consent to an abortion." The City did not emphasize this part of the District Court's holding in the Court of Appeals because that issue was fully briefed and argued in that Court by the Defendant-Intervenors. As the constitutionality of Section 1870.05(B) was fully argued in the Court of Appeals, the question is properly before this Court.

The cases cited to support the Respondents-Cross-Petitioners' contention, however, in no way foreclose review by this Court. The case of United States v. Santana, 427 U.S. 38, 41 n. 2 (1976), merely acknowledges the principle that the Supreme Court will not consider an issue which was not raised in the Court below. Section 1870.05(B) was appealed to and decided by the court below.

The position of this Court in the case of Adickes v. S.H. Kress & Co., 398 U.S. 144, 146 n. 2 (1970), is quite similar to the one expressed in Santana, except that this Court noted that "where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (Emphasis added). The Court left open the option to consider issues not even raised at all in the Court below under appropriate circumstances. Here the issue was both raised in and decided by the Court below.

The case of California v. Taylor, 353 U.S. 553, 556 n. 2d (1957), is of the same nature as the prior two cases. This Court noted in that case that the Court of Appeals had "held that this contention had been waived because it was not briefed there by the state and not mentioned in the state's oral argument." The distinguishing fact between this case and the prior cases is that in Taylor the Court of Appeals had specifically found the issue to have been waived because it had not been briefed or argued before it. Once again, Section 1870.05(B) was both argued and decided by the Court of Appeals and is properly before this Court.

The Respondents-Cross-Petitioners place primary reliance on the case of O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 783 n. 14 (1980).

In O'Bannon, it was urged that the petition be dismissed as the petitioners had not appealed the District Court decision. This Court declined to dismiss the petition. While this Court did not allow the state agency to address the issue that it continue paying its share of benefits, the petitioners were allowed to present the main issue of the petition. As the state agency had a sufficient interest in the question to give it standing to argue the merits, there was no need for the state agency to file an appeal in the Court of Appeals in order to keep the issue alive, and the argument had been vigorously asserted by the federal agency in the Court of Appeals and fully addressed there. The above criteria are all satisfied in the present case. Further, this Court decided in O'Bannon that a party to proceedings in the Court of Appeals who had argued the merits of the major issue presented in a petition for certiorari is automatically joined as respondent in the Supreme Court when a party who was also an appellee files the petition for certiorari, and in such capacity as an automatically joined respondent, the party may seek reversal of the judgment of the Court of Appeals on any ground urged in that court. Thus, the Defendant-Intervenors, who appealed the District Court's holding as to Section 1870.05(B), are automatically joined respondents and may seek

reversal of the Court of Appeals decision.

Section 1870.05(B) is capable of a construction that would render it constitutional. It is not to be assumed that an Ohio juvenile court proceedings will construe the ordinance in a manner inconsistent with the constitutional requirements. Thus, as noted by Judge Kennedy in her dissenting opinion, Section 1870.05(B) is not facially invalid. (App. 33a). As no minor challenges Section 1870.05(B), no party before this Court has standing to challenge the section, and it is premature to hold it unconstitutional. This Court has consistently refused to strike down legislation on its face without a state court determination as to construction and application of the laws. H.L. v. Matheson, 450 U.S. 398, 407 (1981), and Bellotti v. Baird, 443 U.S. 622 (1979). In order to have standing to challenge Section 1870.05(B) as applied, it must be challenged by a minor under the age of fifteen who alleges she is mature or emancipated. Thus, the decision of the lower court should be reversed.

Even if this Court should find Petitioners waived their right to appeal the issue of Section 1870.05(B)'s constitutionality, the Petitioners cannot waive the question of standing or the rights of Defendants-Intervenors.

III. THE STATE HAS A LEGITIMATE

INTEREST IN INSURING INFORMED CONSENT.

Section 1870.06(B) is constitutional in its entirety as it serves the important state interests of protecting the woman's health and assuring that a woman's freedom to choose to have an abortion or to decide to carry the child to term will be truly informed. Contrary to Respondent-Cross-Petitioner's assertions that the City of Akron has conceded that Subsections (3), (4), and (5) are unconstitutional, the City maintains that these subsections are constitutional in their entirety.

The District Court in holding the section unconstitutional incorrectly placed the burden of proving the facts contained therein to be true on the Defendants. (App. 95a). It was incumbent upon the Plaintiffs to show that the facts were not true. The District Court, however, made no findings of fact regarding the subsections involved. Its decision was simply based upon its ruling that the state cannot "specify what each patient must be told." (App. 96a). In so deciding, the District Court noted the desire to insure that a woman's consent to an abortion is truly informed is a valid state interest. (App. 95a).

Section 1870.06(B) requires that the attending physician inform a woman prior to an abortion of several factors.

Subsection (3) requires that the woman be informed that the unborn child is a human life. (App. 121a). Such a statement is clearly factual. (App. 121a). To contend that the unborn fetus is not human life ignores the obvious. The fetus is alive and growing. Otherwise, there would be no need for the woman to make the choice.

Subsection (4) requires the physician to inform the woman that the unborn child may be viable if more than twenty-two weeks have elapsed from the time of conception. (App. 121a). Again, this is a factual statement. It is relevant information to a woman who is pregnant to know at what point the fetus may be viable. It is a fact relating to her pregnancy of which she should be made aware. It is for the woman, in consultation with her physican, to decide whether or not to terminate her pregnancy.

Subsection (5) requires that the woman be informed that an abortion is a major surgical procedure which can result in serious complications. (App. 121a). The testimony at trial was conflicting on this statement. While it is subject to medical debate, such complications do occur. The physican, while informing the woman of the complications, is free to express his opinion as to the likelihood of such complications occurring.

Contrary to Respondent's allegations in the

courts below, nothing in Section 1870.06(B) denies the physican flexibility, as Section 1870.06(C) expressly permits the physician to:

> . . . provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term. (emphasis added)

The requirements of Section 1870.06(B) protect the woman's constitutionally protected right to decide whether or not to terminate her pregnancy. To reach such a decision it is necessary that she be well informed. The provision strikes a reasonable balance between the woman's right of privacy and the state's interest in maternal health and ensuring the informed consent of the patient. Maher, supra, 432 U.S. at 473.

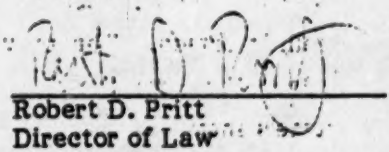
Rather than burdening the decision, this information in fact enhances the woman's ability to make an informed choice.

CONCLUSION

Therefore, the appropriate disposition of this case is to reverse the decision of the Court of Appeals as to Sections 1870.06(C) and 1870.07 and remand for an affirmance of the decision of the District Court as to those sections. As to Sections 1870.05(B), 1870.6(B) and 1870.16, the decision of the Court of Appeals should be reversed.

Dated November 22, 1982.

Respectfully submitted,



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